IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 5, 2009 Session

SIEGEL-ROBERT, INC. v. RUTH E. JOHNSON, COMMISSIONER OF REVENUE, STATE OF TENNESSEE

Appeal from the Chancery Court for Davidson County
No. 02-2356-III Ellen Hobbs Lyle, Chancellor

No. M2008-02228-COA-R3-CV - Filed October 28, 2009

Taxpayer filed a complaint against the Tennessee Department of Revenue, seeking a tax refund for an overpayment of taxes assessed on "nonbusiness earnings." The Department denied Taxpayer's request for a refund, alleging that the income taxed was "business earnings." Upon cross-motions for summary judgment, the trial court granted Taxpayer's motion and denied the Department's, finding that the tax assessment was unconstitutional since the income at issue was used for investment purposes only and not for Taxpayer's business activities operated in Tennessee. On appeal, the Department contends that the income was used in the operations Taxpayer conducted in Tennessee and, as such, should be apportionable to the state for tax purposes. Finding that Taxpayer was entitled to judgment as a matter of law, the decision of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. PATRICIA J. COTTRELL, P. J., M. S., not participating.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Jonathan N. Wike, Assistant Attorney General, Nashville, Tennessee, for the appellant, Ruth E. Johnson, Commissioner of Revenue, State of Tennessee.

Patricia Head Moskal and Joseph W. Gibbs, Nashville, Tennessee, for the appellee, Siegel-Robert, Inc.

OPINION

In this case, we are called upon to determine whether an assessment of excise taxes on interest income earned from the investment in Treasury securities owned by a nondomiciliary corporation which conducted business in Tennessee was constitutional. We hold that the tax assessment was unconstitutional and, consequently, that Taxpayer was entitled to judgment in its favor as a matter of law.

I. Factual and Procedural History

Siegel-Robert, Inc. ("Taxpayer") is a corporation operating through several divisions, including one engaged in the manufacture of decorative plastic parts for automobiles. Taxpayer's automotive division is its largest and was the only business unit operating in Tennessee.[1] Taxpayer's corporate headquarters and commercial domicile is St. Louis, Missouri, and its legal domicile is Nevada. As part of its business operations, Taxpayer utilized a practice whereby funds not needed for operational purposes were invested in overnight repurchase agreements. When funds accumulated in this manner were "significantly in excess" of its operational needs, Taxpayer transferred the funds to investments in Treasury securities. At issue in this case is the excise tax assessed on the interest earned from these investments in Treasury securities.[2] Once the Treasury securities matured, Taxpayer either reinvested the funds into other Treasury securities or used the proceeds to make business acquisitions to implement the company's diversification strategy. All investment activities were conducted in St. Louis and all securities were held in financial institutions located in St. Louis.

In furtherance of its diversification strategy during the tax period at issue, Taxpayer acquired the assets of six companies using the income earned from the investment in Treasury securities. One acquisition was a business called Triad Industries, LLC, ("Triad"), which manufactured the same type of product as the Automotive Division. Taxpayer purchased the assets of Triad through a bankruptcy court proceeding and a portion of the purchase price went directly to a supplier and creditor of Triad in exchange for copper and nickel anodes, materials which are used in the Automotive Division's operations.

In October 2001, Taxpayer filed its Tennessee Franchise and Excise Tax Return for the year ending December 31, 2000, in which it requested a monetary refund of $335,206 and an additional $300,000 credit to be applied to the next year's tax liability, both of which it claimed it was due as the result of an overpayment of taxes. The Department of Revenue ("Department") denied the refund request in a letter dated February 8, 2002. In the letter, the Department advised that it had examined Taxpayer's returns for the periods ending December 31, 1998 through 2000 and, deeming earnings which Taxpayer had deducted as nonbusiness earnings to be business earnings within the meaning of Tenn. Code Ann. § 67-4-804(a)(1) (1998),[3] determined that Taxpayer had additional excise tax liability, plus interest, in the total amount of $127,745.

On August 7, 2002, Taxpayer filed suit against the Department in the Chancery Court for Davidson County, alleging that it was entitled to a refund of the taxes assessed on the interest earned

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[1] Hereinafter, any mention of Taxpayer's "Automotive Division" will refer only to its operations in Tennessee.

[2] Taxpayer concedes that the interest earned from investment in the repurchase agreements was business earnings subject to Tennessee's excise tax. Taxpayer paid taxes on such interest and it is not an issue in this matter.

[3] In 1999, Tenn. Code Ann. § 67-4-804 (1998) was recodified at Tenn. Code Ann. § 67-4-2004; the language of statute is set forth *infra* at Section III(A).

from the investment in Treasury securities during the tax period because the income "constituted nonbusiness earnings and was not income from a unitary business conducted both within and without Tennessee" and, therefore, was not apportionable to Tennessee. The case was transferred to Part III of the Chancery Court where Taxpayer had a pending suit against the Department in which it sought a similar tax refund for the tax periods ending July 31, 1996, July 31, 1997, and December 31, 1997 ("*Siegel-Robert I*"); the cases were not consolidated for trial. The Department filed an Answer in the present case after its transfer to Part III; the Department did not counterclaim for the tax deficiency stated in its February 2002 letter to Taxpayer.

On August 17, 2006, the trial court entered an order in *Siegel-Robert I* in which it granted Taxpayer's motion for summary judgment and denied the Department's summary judgment motion, finding that "the earnings in issue are nonbusiness earnings which serve an investment function and, therefore, are not taxable by the State of Tennessee." Specifically, the court found that "the interest earned on the U.S. treasury securities in this case was not used by the taxpayer to put back into the business for operational and working capital needs" and that it "served an investment function." The court also found that "the manufacturing activities in Tennessee are wholly unrelated to the investment activities in St. Louis, Missouri" and that "the taxpayer's investments in treasury securities were not held for or used as working capital...which forms part of the working capital of the corporation's unitary business." The Department did not appeal that decision.

On August 8, 2007, the Department filed a Motion for Summary Judgment in the present case, asserting that Taxpayer was not entitled to a refund because "interest income from short-term investments in U.S. Treasury Securities constitute[d] business earnings...which must be apportioned among all the states in which [Taxpayer] pays franchise and excise taxes." Along with its motion, the Department submitted a Notice of Filing, which included as attachments the complaint filed by Taxpayer in *Siegel-Robert I* and the affidavit of Wendy Bishop, a paralegal in the Attorney General's office, with appended printouts from Taxpayer's website and an opinion in the case titled *Swope, et al. v. Siegel-Robert, Inc.*, 74 F.Supp.2d 876 (E.D.Mo. 1999),[4] among other things.

On September 5, the Department filed an Additional Request to Take Judicial Notice,[5] asking the court to take notice of "facts regarding the nature and business use of United States Treasury Securities" set forth in the attachments to the simultaneously filed affidavit of Jonathan N. Wike, an Assistant Attorney General for Tennessee, which consisted of "learned treatises and Internet sites on the subject of corporate finance."

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[4] The *Swope* case involved a dispute over the valuation of shares Taxpayer intended to redeem from its shareholders during the company's reorganization. Taxpayer sought the exclusion of the opinion from this case in a Motion to Strike, in which it argued that "[t]he factual findings made...in an unrelated civil action between different parties in *Swope*...are inadmissible hearsay." In its Response to Taxpayer's Motion to Strike, the Department stated that "although the [Department] believes that the findings of fact in the [*Swope* case] are relevant to this case, the [Department] does not contest [Taxpayer's] argument as to the findings of fact."

[5] The Department filed a prior Request to Take Judicial Notice, the contents of which are not relevant to this appeal.

On September 17, 2007, Taxpayer filed a Motion for Summary Judgment, asserting that the taxes "were unjust, illegal and contrary to law" based upon the reasoning behind the court's grant of summary judgment in *Siegel-Robert I*. On September 28, Taxpayer filed a Motion to Strike, asking the court to strike from the record, among other things, its complaint filed in *Siegel-Robert I*, Ms. Bishop's and Mr. Wike's affidavits, and their attachments; the motion also raised an objection to the Department's Additional Request to Take Judicial Notice.

On October 22, 2007, the Department filed a Third Affidavit of Jonathan N. Wike,[6] in which it stated that "[a]ttached hereto as Exhibits 1-4 are certified copies of the trial testimony of Mr. Halvor B. Anderson given on February 8 and 9, 1999, in *Thomas Swope, et al. v. Siegel-Robert, Inc.*"[7]

In an order entered on October 23, 2007, the trial court granted Taxpayer's Motion to Strike the complaint filed in *Siegel-Robert I*, Ms. Bishop's and Mr. Wike's affidavits, and their attachments; the order also denied the Department's Additional Request to Take Judicial Notice.

On April 18, 2008, Taxpayer filed a Third Motion to Strike,[8] asking the court to strike from the record the Third Affidavit of Jonathan N. Wike and the exhibits "attached thereto, consisting of copies of portions of trial testimony and a post-trial brief filed in the Missouri federal district court case *Swope v. Siegel-Robert, Inc.*," among other things. In an order entered on May 9, 2008, the trial court granted the motion "for the reason that the subject materials from the 1999 case of *Swope v. Siegel-Robert, Inc.* are dated, not relevant, and not useful to this Court in addressing the issues presented on the parties' cross-motions for summary judgment."

On August 13, 2008, the trial court entered a Memorandum and Order, granting Taxpayer's motion for summary judgment and denying the Department's motion, finding that "the undisputed facts establish that [Taxpayer] did not use the [investment] interest for the operations of the manufacturing facilities in Tennessee and that [Taxpayer's] acquisition of treasury securities was pursuant to a long-term corporate strategy of purchasing diversified businesses." The trial court entered a Final Judgment Order on September 3, awarding Taxpayer $560,458, which constituted a refund of $335,206, plus interest in the amount of $225,252. The Department appeals.

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[6] The Department filed a Second Affidavit of Jonathan N. Wike, the contents of which are not relevant to this appeal.

[7] Mr. Anderson was Taxpayer's former chief executive officer.

[8] Taxpayer filed a Second Motion to Strike, asking the court to strike the Third Affidavit of Jonathan N. Wike. In an order entered November 21, 2007, the trial court acknowledged that Mr. Wike's affidavit was filed on the "eve of the summary judgment hearing" and, consequently, denied "the motion to strike without prejudice to [Taxpayer] to reassert the motion or incorporate the motion in its motion for summary judgment after the deadlines set out below for discovery on the new evidence have passed." In its Third Motion to Strike, Taxpayer "renew[ed] its Second Motion to Strike previously filed in this action."

II. Statement of the Issues

On appeal, the Department raises the following issues:

1. Whether the Chancery Court erred in holding that the interest income Taxpayer earned on its investments in United States Treasury securities was non-business earnings as defined in Tenn. Code Ann. § 67-4-2004, when such investments were an integral part of Taxpayer's regular business operations and were used for the direct benefit of the company.

2. Whether the Chancery Court erred in holding that taxation of such interest income by the State of Tennessee is unconstitutional under the Commerce Clause of the United States Constitution, when the investments in Treasury securities as well as the interest earned on the investments were used for purposes that were central to the operation, continuation, and expansion of Taxpayer's unitary business.

3. Whether the Chancery Court erred in striking from the record the complaint filed by Taxpayer in a pending tax case on substantially the same issues.

4. Whether the Chancery Court erred in striking from the record statements from treatises on corporate finance, which expound on the use of Treasury securities in corporate finance.

5. Whether the Chancery Court erred in striking from the record information found on Taxpayer's Internet website, which shows the similarities between the manufacturing activities at Taxpayer's manufacturing plants.

6. Whether the Chancery Court erred in striking from the record testimony by Taxpayer's former president in a trial in federal district court, which gives a detailed picture of the manner in which Taxpayer's corporate headquarters managed the subsidiaries Taxpayer acquired with funds derived from its investment activities.

III. Analysis

A. Evidentiary Issues

The Department contends that the trial court erred in granting Taxpayer's motions to strike the complaint filed in *Siegel-Robert I*, the learned treatises on corporate finance, the printouts from Taxpayer's website, and Mr. Anderson's trial testimony in the *Swope* case, asserting that the evidence was admissible to support its motion for summary judgment and to oppose Taxpayer's motion.

In opposing a motion for summary judgment, "the facts on which the nonmovant relies must be admissible at the trial but need not be in admissible form as presented in the motion (otherwise an affidavit, for example, would be excluded as hearsay)." *Byrd v. Hall*, 847 S.W.2d 208, 216-17 (Tenn. 1993). "To permit an opposition to be based on evidence that would not be admissible at trial would undermine the goal of the summary judgment process to prevent unnecessary trials since inadmissible evidence could not be used to support a jury verdict." *Id*. at 217. Thus, since this Court applies a *de novo* review to a trial court's disposition of a matter on summary judgment, we must first determine whether the evidence filed and relied upon by the Department in support of its motion and in opposition to Taxpayer's should be considered in ruling on the motions.

"The admission or exclusion of evidence is within the trial court's discretion." *White v. Vanderbilt Univ.,* 21 S.W.3d 215, 222 (Tenn. Ct. App. 1999) (citing *Seffernick v. Saint Thomas Hosp.,* 969 S.W.2d 391, 393 (Tenn. 1998)). "[R]eviewing courts will not second-guess a trial court's exercise of its discretion simply because the trial court chose an alternative that the appellate court would not have chosen." *Id*. at 223 (citing *Overstreet v. Shoney's, Inc.,* 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999)). Rather, "[a]ppellate courts should permit a discretionary decision to stand if reasonable judicial minds can differ concerning its soundness." *Id*. (citing *Overstreet,* 4 S.W.3d at 709). Discretionary decision "must take the applicable law into account and must also be consistent with the facts before the court." *Id*. (citing *Overstreet,* 4 S.W.3d at 709). A discretionary decision will be set aside "only when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." *Id*. (citing *Overstreet,* 4 S.W.3d at 709). "Thus, a trial court's discretionary decision should be reviewed to determine: (1) whether the factual basis for the decision is supported by the evidence, (2) whether the trial court identified and applied the applicable legal principles, and (3) whether the trial court's decision is within the range of acceptable alternatives." *Id*. (citing *BIF v. Service Constr. Co.,* 1988 WL 72409, at *3 (Tenn. Ct. App. July 13, 1988)).

Complaint in Siegel-Robert I

In its first motion to strike, Taxpayer sought the exclusion of the complaint it filed in *Siegel-Robert I* on the grounds of lack of relevance and materiality. The trial court struck the complaint from the record on the ground of relevance. On appeal, the Department asserts that the factual statements made in the complaint in *Siegel-Robert I* were admissible because the statements were "relevant and material to the matter that is being tried."

"[F]actual statements contained in pleadings filed in other cases are admissions of a party opponent," *Pizzillo v. Pizzillo*, 884 S.W.2d 749, 753 (Tenn. Ct. App. 1994); however, "[t]hese admissions are not conclusive." *Pankow v. Mitchell*, 737 S.W.2d 293, 296 (Tenn. Ct. App. 1987). The admissions in pleadings filed in other cases "may be received into evidence against the pleader on the trial of another action to which he is a party as long as the statement is relevant and material to the issues being tried," *Pankow*, 737 S.W.2d at 296, and as long as "they are inconsistent with the pleader's contentions in the present case." *Pizzillo*, 884 S.W.2d at 753. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. "All relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible." Tenn. R. Evid. 402.

In its Response to Taxpayer's Motion to Strike, the Department contended that "the facts stated in [the *Siegel-Robert I*] complaint differed briefly but significantly from the facts presented in the complaint now before the Court" because, in *Siegel-Robert I*, Taxpayer "was willing to inform th[e] Court that its automotive division had locations in...Tennessee;...Arkansas; and...Missouri" and, "[i]n its complaint in the current case, [Taxpayer] for some reason did not bring the locations of the automotive division to this Court's attention." The fact that the complaint filed in *Siegel-Robert I* was related to a different tax period does not *ipso facto* make the complaint irrelevant; rather relevance must be determined by considering the specific information for which the complaint is offered as evidence. We discern no evidentiary value to the present case of proof that, in the complaint filed in a prior case, Taxpayer identified the specific locations of its automotive division facilities. This proof does not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" in the present matter and is, accordingly, irrelevant.

Treatises

In its first motion to strike, Taxpayer sought to exclude the information attached to the Affidavit of Jonathan N. Wike, which contained "learned treatises and Internet sites on the subject of corporate finance," on the grounds that it was inadmissible hearsay and that the material exceeded the purposes of judicial notice.[9] The trial court struck Mr. Wike's affidavit and denied the Department's Request to Take Judicial Notice of the information found in Mr. Wike's affidavit on the grounds of hearsay, inadmissible "learned treatise," lack of authentication, lack of relevance, and lack of materiality. On appeal, the Department contends that the trial court's action "unnecessarily thwarted the [Department's] attempt to educate the Trial Court about the use of Treasury securities in corporate finance and to put [Taxpayer's] use of such investments into context."

"[S]tatements contained in published treatises...may be used to impeach the expert witness's credibility but may not be received as substantive evidence." Tenn. R. Evid. 618. Therefore, since the information from treatises cannot be "received as substantive evidence," but rather may be used for the purpose of impeaching an expert witness's credibility, the information could not be considered pursuant to Tenn. R. Evid. 618.

A court can only take judicial notice of a fact "not subject to reasonable dispute, in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of

[9] In his affidavit, Mr. Wike stated that "[a]ttached hereto as Exhibit A are print-outs from various Internet web sites which contain discussions of United States Treasury Securities" and that "[a]lso attached as Exhibit A are pages copied from various learned treatises on the subject of corporate finance...personally obtained...from the Owen Management Library at Vanderbilt University."

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(b). In its Response to Taxpayer's Motion to Strike, the Department stated that "[i]t is unreasonable to expect the [Department] to 'authenticate' the websites [it] has cited"; that "[i]f [Taxpayer] has evidence that the...web pages the [Department] has introduced are bogus, [Taxpayer] should say so"; and that "an affidavit stating that the website was visited and copies of the pages downloaded from that website should be 'authentication' enough." Contrary to the Department's position, judicial notice does not factor in the "unreasonableness" of requiring a party to authenticate information it sought to be judicially noticed; in fact, a party's inability to prove accuracy of information, whether reasonable or not, is evidence against the unquestionable nature of the information. Rather, the rules regarding judicial notice require the party requesting that a court to take judicial notice prove the accuracy of the information and there must not be a reasonable question as to such accuracy. Here, the Department failed to sufficiently prove the accuracy of the sources of the information it sought to be judicially notice such that the accuracy of the sources cannot be reasonably questioned. Furthermore, the rules do not require an opposing party to dispute the accuracy of the information to prevent a trial court from taking judicial notice; instead, the burden is on the party seeking judicial notice to prove its accuracy. As previously stated, this the Department has failed to do.

Printouts from Taxpayer's Website

In its first motion to strike, Taxpayer sought to exclude the information attached to Wendy Bishop's affidavit, which contained printouts from Taxpayer's website, on the grounds of inadmissible hearsay, lack of authentication, and lack of relevance. Taxpayer contended that "[w]hile [the Department] may attempt to argue that the website pages are 'admissions' of [Taxpayer] as a party-opponent and, therefore, within an exception to the hearsay rule..., [the Department] still has failed to properly authenticate the website information as required by Rule 901 of the Tennessee Rules of Evidence" and that "[e]ven if [the Department] could overcome both the hearsay and lack of authentication objections, the website information simply [wa]s not relevant as it is outside the tax period that is the subject of this litigation." The trial court struck the information on the grounds of hearsay, lack of authentication, lack of relevance, and lack of materiality.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." Tenn. R. Evid. 901. In its motion to strike, Taxpayer stated that the Department "had every opportunity during discovery by way of requests for admission, requests for documents, and/or depositions of [Taxpayer's] representatives to authenticate the website information...[y]et [the Department] failed or chose not to do so." In its Response to Taxpayer's Motion to Strike, the Department stated that "[i]t is unreasonable to expect the [Department] to 'authenticate' the websites [it] has cited, and that goes for [Taxpayer's] website as well"; that "[i]f [Taxpayer] has evidence that the website information the [Department] has cited from its corporate website is incorrect..., [Taxpayer] should say so"; and that "an affidavit stating that the website was visited and copies of the pages downloaded from that website should be 'authentication' enough."

Upon a review of the pages attached to Ms. Bishop's affidavit, we find that there to be sufficient evidence to support the Department's assertion of authenticity. The top of each page contains Taxpayer's corporate logo, which says "Siegel-Robert Automotive," and the bottom of each page lists the Internet address where the page is located, which links to Taxpayer's website. In addition, the bottom of each page includes a copyright obtained by "Siegel-Robert, Inc." Taxpayer does not argue that the pages are not authentic, but rather asserts that the Department failed to properly authenticate this information through other means. We find the pages printed by the Department from Taxpayer's website to bear sufficient indicia of Taxpayer's business to authenticate the information contained therein.

While the pages attached to Ms. Bishop's affidavit were sufficiently authenticated as being from Taxpayer's website, we find the information contained in those pages to be irrelevant to the present matter. First, the bottom of each page indicates that it was viewed and printed on August 7, 2007, seven years after the tax period at issue; the bottom of the page also indicates that the information on the page was copyrighted in 2005, five years after the tax period at issue. Furthermore, the information on the website details Taxpayer's automotive facilities, both within and without Tennessee, and the "Processes" performed at each plant. We find the content of the pages, coupled with the dates applicable to the information contained therein, to be irrelevant to the issue of whether the tax assessment during the tax period at issue was constitutional.

Mr. Anderson's Testimony from the Swope *Case*

In its third motion to strike, Taxpayer sought to exclude the information attached to Mr. Wike's Third Affidavit, which included the trial testimony of Halvor Anderson, Taxpayer's former Chief Executive Officer, taken during the *Swope* case, on the grounds of relevance. The trial court struck the trial testimony from the record on the ground that it was not relevant. The court elaborated on its ruling in its Memorandum and Order, stating that "[t]he parties, claims, defenses, factual issues and legal issues [in the *Swope* case] were different from this case"; that "the time in issue in this case...occurred after the date in issue in the *Swope* case"; and that "it is not clear to the Court the need for the [Department] to prove facts through trial testimony in an unrelated, untimely case since the [Department] could have taken the depositions [sic] of Mr. Halvor Anderson."

In its brief on appeal, the Department asserts that the testimony did not relate to a different time period because Mr. Anderson "was testifying in 1999..., which is the tax period at issue in this case, and he was using the present tense to describe the company"; the trial testimony "describes, more fully than does [Mr. Anderson's] deposition testimony in 2000 and 2002 tax cases, how [Taxpayer] interacted with its subsidiaries after they were acquired"; that the testimony falls under a hearsay exception; and that Taxpayer was judicially estopped from denying the statements made under oath.

We find that Mr. Anderson's trial testimony from the *Swope* case to be irrelevant to the present matter. Mr. Anderson's testimony was given during a trial unrelated to, and concerning legal matters not at issue in, the present matter. Furthermore, during the deposition he gave during *Siegel-*

Robert I, the Department had the opportunity to question Mr. Anderson regarding the information testified to in his *Swope* case. Unlike Mr. Anderson's trial testimony in the *Swope* case, his deposition in *Siegel-Robert I* involved all the same parties and similar legal issues. Moreover, the Department has presented no proof that Mr. Anderson was not available to give a deposition in the present matter, at which he could have been questioned about the testimony he provided in the *Swope* case. Mr. Anderson's *Swope* testimony was not relevant to the present matter, nor was it necessary in light of Mr. Anderson's *Siegel-Robert I* deposition and his availability to provide a deposition in the present matter.

B. Summary Judgment

Having determined which evidence is properly before the Court, we now turn to our review of the parties' cross motions for summary judgment. Neither party disputes the fact that Taxpayer conducted business in Tennessee, thereby justifying the state's ability to tax its earnings. *Newell Window Furnishing, Inc. v. Johnson*, 2008 WL 5169560, at *5 (Tenn. Ct. App. Dec. 9, 2008) (citing *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 778 (1992)) ("where...a taxpayer has done business in the State, taxation is justified by the 'protection, opportunities and benefits' the State has conferred on the taxpayer's activities within the State"). The inquiry is whether the Department was constitutionally permitted to impose a tax on the earnings at issue. *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue*, 128 S.Ct. 1498, 1505 (U.S. 2008) ("[w]here...there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax").

A state's power to tax out-of-state income is limited by the Due Process and Commerce Clauses of the United States Constitution, which "impose distinct but parallel limitations on a State's power to tax out-of-state activities." *MeadWestvaco Corp.*, 128 S.Ct. at 1505. "The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Allied-Signal*, 504 U.S. at 777 (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)). In order to determine whether a state's tax assessment complies with the requirements of the Due Process and Commerce Clauses, the United States Supreme Court developed the "unitary business principle," under which "a State need not 'isolate the intrastate income-producing activities from the rest of the business' but 'may tax an apportioned sum of the corporation's multistate business if the business is unitary.'" *MeadWestvaco Corp.*, 128 S.Ct. at 1505 (quoting *Allied-Signal*, 504 U.S. at 772). Thus, a court must determine whether "intrastate and extrastate activities formed part of a single unitary business," *Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 438 (1980), or whether the out-of-state income "derive[d] from 'unrelated business activity' which constitutes a 'discrete business enterprise.'" *Exxon Corp. v. Department of Revenue of Wis.*, 447 U.S. 207, 224 (1980) (quoting *Mobil Oil*, 445 U.S. at 441); *see MeadWestvaco Corp.*, 128 S.Ct. at 1505.

"The courts have devised several tests for determining whether a business is unitary." *Louis Dreyfus Corp. v. Huddleston*, 933 S.W.2d 460, 468 (Tenn. Ct. App. 1996). In creating the

"operational function" test, the United States Supreme Court stated that "[w]hat is required...is that the capital transaction serve an operational rather than an investment function." *Allied-Signal*, 504 U.S. at 787. "In order to exclude certain income from the apportionment formula, the company must prove that 'the income was earned in the course of activities unrelated to [the activities carried out in the taxing] State.'" *Exxon Corp.*, 447 U.S. at 223 (quoting *Mobil Oil*, 445 U.S. at 439). "[T]he mere fact that an intangible asset was acquired pursuant to a long-term corporate strategy of acquisitions and dispositions does not convert an otherwise passive investment into an integral operational one." *Allied-Signal, Inc.*, 504 U.S. at 788. "[T]he fact that a transaction was undertaken for a business purpose does not change its character." *Id*. "[T]he relevant unitary business inquiry [is] one which focuses on the objective characteristics of the asset's use and its relation to the taxpayer and its activities within the taxing State." *Id*. at 785. In explaining this test, the Court offered the following hypothetical: "[h]ence, for example, a State may include within the apportionable income of a nondomiciliary corporation the interest earned on short-term deposits in a bank located in another State if that income forms part of the working capital of the corporation's unitary business." *Id*. at 787-88.

If a tax assessment is found to be constitutional, then the next step is to determine whether the assessment complies with Tennessee's "Excise Tax Law,"[10] which provides for the taxation of corporations "for the privilege of doing business in this state." *Associated P'Ship I, Inc. v. Huddleston*, 889 S.W.2d 190, 195 (Tenn. 1994). There are two established "methods by which corporate income will be divided for excise tax purposes." *Id*. A corporation is required to divide its income "among those states in which it is doing business according to whether such income is classified as 'business earnings' or 'nonbusiness earnings' with the tax of business earnings being apportioned among the various states...and with the tax based upon nonbusiness earnings being allocated to its source in a particular state." *Newell Window Furnishing, Inc.*, 2008 WL 5169560, at *4 (citing *Gen. Care Corp. v. Olsen*, 705 S.W.2d 642, 644 (Tenn. 1986)). "Business earnings" are defined as "earnings arising from transactions and activity in the regular course of the taxpayer's trade or business or earnings from tangible and intangible property, if the acquisition, use, management or disposition of the property constitutes an integral part of the taxpayer's regular trade or business operations." Tenn. Code Ann. § 67-4-2004(4) (Supp. 2001). "Nonbusiness earnings" are "all earnings other than business earnings." Tenn. Code Ann. § 67-4-2004(27) (Supp. 2001). A "taxpayer must show by clear and cogent evidence that particular earnings are classifiable as nonbusiness earnings." Tenn. Code Ann. § 67-4-2004(4).

The issues in the present matter were resolved in the trial court upon the parties' cross-motions for summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Rule 56, Tenn. R. Civ. P., have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977). Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stovall*, 113 S.W.3d at 721. We

[10] Tenn. Code Ann. § 67-4-2001, *et. seq*.

consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003); *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. Neither party contends on appeal that genuine issues of material fact exist regarding the trial court's holding that the imposition of the excise tax was unconstitutional. Therefore, our review of whether, under the undisputed facts, the tax imposition was constitutional is a matter of law. Since our review concerns questions of law, we review the record *de novo* with no presumption of correctness. *See* Tenn. R. App. P. 13(d); *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). However, "[t]ax assessments are presumed to be valid" and "a taxpayer who challenges a...tax assessment must show by clear and convincing evidence that the...application of the apportionment formula has caused extraterritorial value to be taxed." *Louis Dreyfus Corp. v. Huddleston*, 933 S.W.2d 460, 467 (Tenn. Ct. App. 1996).

In its motion for summary judgment, Taxpayer asserted that it met its burden of proving that the tax assessment "was contrary to the laws of Tennessee and violated the Commerce Clause and Due Process Clause of the United States Constitution" because "the interest income generated from [Taxpayer's] investment in United States government securities constituted nonbusiness earnings for Tennessee excise tax purposes" and Taxpayer's "investment activities conducted outside Tennessee were non-unitary with its manufacturing activities conducted within Tennessee and those investment activities served an investment function, not an operational function." Taxpayer contended that "[b]ased on the undisputed, material facts, [it] [wa]s entitled to summary judgment in its favor as a matter of law."

In support of its motion, Taxpayer relied upon the Department's February 8, 2002, letter denying its refund request; the affidavit of Steven Schultheis, Taxpayer's Corporate Tax Manager; Taxpayer's list of business acquisitions[11]; the deposition of Halvor Anderson; the 2007 deposition of Robert A. Smith, Taxpayer's former Corporate Controller and Director of Taxes; the deposition of Robert Bowron, Taxpayer's Treasurer; and the affidavit of Richard J. Schwartze, Taxpayer's Vice President, Secretary and Chief Legal Officer.

The affidavit of Mr. Schultheis stated, in part pertinent, that "[d]uring the audit period, the funds invested by [Taxpayer] in United States treasury securities were held for investment purposes only, and not for operational purposes" and that "[d]uring the audit period, [Taxpayer] did not need or use the funds invested in United States treasury securities or the interest earned thereon to fund the day-to-day operations of [Taxpayer's] automotive division or subsidiaries." During his deposition, Mr. Anderson testified that the intended and actual use of the investment income was for furthering the diversification program through the acquisition of other companies and that Taxpayer had expanded as a result of the program.

[11] Taxpayer's list of acquisitions confirmed that it acquired six companies during the applicable tax period, including Triad.

During his deposition, Mr. Smith testified that, in order to make investments in Treasury securities, "funds would be set aside outside of our operating needs to further expand our business to meet a diversification plan." Mr. Smith stated that the Treasury securities were held for investment and for the diversification program and were not held for "operational purposes." Mr. Smith testified that the actual use of the income earned from the Treasury securities was to purchase businesses or repurchase other Treasury securities and that the Automotive Division "generate[d] sufficient cash from its operations to fund its capital replacement and working capital" and "to fund its day-to-day operational expenses."

During his deposition, Mr. Bowron testified that, upon maturity, the income earned from the investment in Treasury securities would be used to "buy the particular company that [Taxpayer was] investing in or [Taxpayer] would reinvest in another security." Mr. Bowron stated that the acquisition of new businesses "would add value to our company..., which would - - with the intent of growing the company, increas[e] the profits" and that the diversification strategy focused on acquiring "nonautomotive" businesses. Mr. Bowron testified that the income earned from the investment in Treasury securities was used only for Taxpayer's acquisition program. Mr. Bowron stated that Taxpayer had two bank accounts, a custodial account which held the Treasury securities and a main bank account, named Siegel-Robert Automotive Main. Mr. Bowron testified that Taxpayer "maintained daily account balances [in the Siegel-Robert Automotive Main account] sufficient to meet the day-to-day operational needs and expenses of the company" and that Taxpayer did not need to "withdraw money from its custodial account, its investment in Treasury securities, [and] move it to its primary banking account to meet its daily operational needs." Mr. Bowron stated that the income earned from the investment in Treasury securities were not used for operational needs and that the actual use of the income was to "further the investment strategies of [Taxpayer]."

The affidavit of Mr. Schwartze stated, in part pertinent, that the purchase of copper and nickel anodes in the acquisition of Triad's assets were not used for operational purposes by the Automotive Division and that the "acquisition of the assets of [Triad] was not an expansion of any of [Taxpayer's] existing [A]utomotive [D]ivision plants, but was an acquisition of a new facility in...Kentucky."

In support of its motion for summary judgment, Taxpayer also filed a Statement of Material Facts, to which the Department provided the following responses, in part pertinent:

> 10. [Taxpayer's] automotive division generated sufficient cash from operations to fund its operational or working capital requirements during the audit period. [Schultheis Aff.; 2007 Smith Depo....]
> RESPONSE: Disputed. . .[I]t is disputed that [Taxpayer] was able to meet all of its "operational" needs...without resort to funds invested in Treasury securities. *See* [Department's Statement of Undisputed Material Facts] Nos. 65-66, 68-74, 79-82, 52-55.
> ***

17. During the audit period, the funds invested by [Taxpayer] in United States treasury securities were held for investment purposes only, not operational purposes. [Schultheis Aff.; 2007 Smith Depo....; Bowron Depo....]
RESPONSE: Disputed. During the audit period, [Taxpayer] used the funds invested in Treasury securities to pay a legal settlement, which is not an investment purpose but is vital to the continuation of the entire corporation. [Taxpayer] also invested funds in Treasury securities during the audit period and used those funds shortly after the audit period to expand the automotive division. Further, [Taxpayer] used its entire program of investing in Treasury securities and using the funds from those investments to acquire companies that became subsidiaries as a method of expanding the unitary business of [Taxpayer]. [Statement of Additional Facts] Nos. 5, 7-32, 34-35, 37-38, 40-41, 43, 45-46, 52-55.
18. During the audit period, [Taxpayer] did not need or use the funds invested in United States treasury securities and the interest income earned thereon to fund the day-to-day operations of [Taxpayer's] automotive division or subsidiaries. [Schultheis Aff.; Bowron Depo....]
RESPONSE: Disputed. Because [Taxpayer] used one bank account for payables, receivables, purchases of and deposits from repurchase agreements, purchases of and deposits from Treasury securities, deposits of income from subsidiaries, and purchases of acquired companies, it is impossible to say that [Taxpayer] did not use the funds invested in Treasury securities to fund day-to-day operations. [The Department's Statement of Material Facts] Nos. 57-65.
***
27. During the audit period, [Taxpayer] pursued its strategy of acquiring diversified businesses outside of the automotive industry to offset [Taxpayer's] dependence on the cyclical automotive industry. [Schultheis Aff.; Anderson Depo....]
RESPONSE: Disputed. One of [Taxpayer's] acquisitions during the audit period, which was funded through the Treasury investment activities, was in the same business as [Taxpayer's] automotive division and became part of that division. [The Department's Statement of Material Facts] Nos. 68-74. Further, [Taxpayer] used funds from the Treasury investments to pay a legal settlement, such payment being essential to the continued operation of all of [Taxpayer's] various components. [The Department's Statement of Material Facts] Nos. 65-66.
***
38. [Taxpayer's] actual use of the excess funds invested in United States treasury securities was to implement its strategy of diversification by acquiring other businesses. [Anderson Depo....]
RESPONSE: Disputed. Various facts show that [Taxpayer] used the funds available from its Treasury securities for purposes other than acquisitions to diversify its business.

The materials submitted by Taxpayer in support of its motion for summary judgment show that the income earned from the investment in Treasury securities was not used to fund the

operations of the Automotive Division or to acquire businesses related to, or for the purpose of expanding, the Automotive Division; the materials also show that the Automotive Division generated sufficient income from its activities to fund its operations, without the need for funding from the income earned from the investment in Treasury securities. This was sufficient for Taxpayer to meet its burden of proving that the tax assessment at issue was unconstitutional as a matter of law since they show the use of the income earned from investment in Treasury securities did not bear a relation to the Automotive Division. The burden was then shifted to the Department to come forward with evidence which negated an element of Taxpayer's contention that the tax assessment was unconstitutional; specifically, the Department needed to submit evidence to show the existence of a relation between the use of the investment income and the Automotive Division.

In its Response to Taxpayer's Motion for Summary Judgment, the Department contended that Taxpayer cannot meet its burden of showing by clear and cogent evidence that the tax assessment was unconstitutional because "the Treasury securities served an operational function on the basis that they provided an economic cushion to the company" by "shield[ing] the [A]utomotive [D]ivision from the ups and downs of the automotive industry" and because Taxpayer "deviated from its avowed purpose of using funds from the Treasury investments to fund diverse acquisitions" by "us[ing] the Treasury funds to pay a legal settlement and related fees"; "us[ing] the funds to acquire a source of raw materials for the [A]utomotive [D]ivision," the copper and nickel anodes; and "us[ing] the funds to acquire assets for the [A]utomotive [D]ivision," the assets of Triad.

In its opposition to Taxpayer's motion for summary judgment, the Department relied upon the materials it submitted in support of its motion for summary judgment, which included the complaint and answer filed in the present case; the deposition of Mr. Anderson; the deposition of David Brown, Taxpayer's Vice President of Corporate Development; the 2004 and 2007 depositions of Mr. Smith; the deposition of Mr. Bowron; and the affidavit of Richard Grant, a professor of Finance and Economics at Lipscomb University.[12]

During his deposition, Mr. Brown testified that the "criteria for companies that [Taxpayer] would be interested in purchasing changed" to focus on companies that were "synergistic," which meant finding a company that produced a "product line that might be sold through the same market channels" as a business unit already owned by Taxpayer.

During his 2004 deposition, taken as part of the *Siegel-Robert I* proceedings, Mr. Smith testified that Taxpayer accumulated "revenues from all sources," which "go into [a] pool of cash," and that, after the "working capital needs" were determined and paid, the "excess gets rolled into the investments." Mr. Smith stated that the purpose and actual use of the income earned from the investment in Treasury securities were for investments only to "facilitate our acquisition strategy and

[12] Mr. Grant's affidavit stated, in part pertinent, that "[t]hat a company invests in repurchase agreements, U.S. Treasury Bills, and U.S. Treasury Notes does not, in and of itself, make that company an investment company. Rather, investment in these instruments or other near-cash investments is a routine part of the asset management of any prudent business enterprise." Mr. Grant stated that his statements were "based on [his] knowledge of corporate finance and investment" and "consistent with the prevailing views in the academic community."

diversification strategy." During his 2007 deposition, taken as part of the current proceedings, Mr. Smith testified that Triad made the "same type of product" as the Automotive Division. Mr. Smith also stated that there was a desire to find acquisitions that were more "synergistic," which meant finding "acquisitions for existing companies...saying we're in this industry, let's try to make this company that we have a little bit stronger in that particular market."

During his deposition, Mr. Bowron testified that the income earned from the investment in Treasury securities would go into the Siegel-Robert Automotive Main account upon maturity before being used to acquire a business or purchase another Treasury security. Mr. Bowron also stated that the day-to-day operations of the Automotive Division, the stock valuation lawsuit settlement and resulting legal fees were paid out of the Siegel-Robert Automotive Main account. Lastly, Mr. Bowron testified that the purchase of the assets of Triad included the purchase of copper and nickel anodes, which are used in the Automotive Division's operations.

In support of its motion for summary judgment, the Department filed a Statement of Undisputed Material Facts, to which Taxpayer provided the following responses, in part pertinent:

> 51. The reason for looking to acquire companies was for diversification, which would mean going into something other than the automotive industry to smooth out the cyclical nature of the automotive industry. Bowron Dep....
> RESPONSE: Undisputed, but by way of clarification [Taxpayer] further states that Mr. Bowron qualified his testimony by stating that "generally speaking" diversification meant buying companies that were not in the automotive industry. Bowron Dep.
> ***
> 61. [Taxpayer] deposited the cash it received upon the maturity of the Treasury securities into the account designated "Siegel-Robert Automotive Main." Bowron Dep.
> RESPONSE: Disputed to the extent that the testimony cited is incomplete and misleading. [Taxpayer] further responds that Mr. Bowron's more complete testimony describing the handling of funds used for investment purposes is set forth at Bowron Dep....Mr. Bowron further testified that upon maturity of the treasury securities held by the company, the funds would either be used to acquire a particular company that [Taxpayer] was investing in or the funds would be reinvested in another treasury security. Bowron Dep... *See also* Schultheis Aff.
> ***
> 63. The company paid its payables, i.e., amounts for the day-to-day operations of its automotive division, from the account designated "Siegel-Robert Automotive Main." Bowron Dep.
> RESPONSE: Undisputed, but the testimony cited by [the Department] does not support this statement. *See* Bowron Dep....
> ***

65. The company made a large payout in settlement of a shareholder lawsuit out of the account designated "Siegel-Robert Automotive Main." Bowron Dep.
RESPONSE: Undisputed, but by way of clarification, Mr. Bowron's more complete testimony about the shareholder appraisal rights lawsuit relating to the company's reorganization from a C corporation to a Subchapter S corporation is set out [in his deposition]. *See also* Bowron Dep. Exhibit 3..., in which [Taxpayer] explained that the funds used to resolve the shareholder litigation and redeem the stock of those shareholders did not constitute a "day-to-day" operational expense or operational use of the funds invested in treasury securities.
***
72. Triad made the same product that [Taxpayer's] automotive division makes. 2007 Smith Dep....
RESPONSE: Disputed, but not material for purposes of summary judgment. By way of clarification, [Taxpayer] further responds that Mr. Smith actually testified that Triad made the same "type of product" made by [Taxpayer]. 2007 Smith Dep....
***
79. The minutes from [Taxpayer's] February 19, 1999 board meeting contain Mr. Anderson's explanation of the Triad purchase:

> Mr. Anderson first reported on the Company's interest in purchasing the assets of [Triad], a startup company located in Bowling Green, Kentucky. . .Mr. Anderson further stated that the proposed acquisition provides a good strategic opportunity to move work from some of the existing plants of the Company. Some plants are operating in excess of desired or practical capacity. Movement of work to a new facility would hopefully improve overall performance be effectively downsizing existing plants to more manageable sizes.

Bowron Dep., Exh. 5-A.
RESPONSE: ...Undisputed to the extent that the board minutes speak for themselves. [Taxpayer] further responds that [Taxpayer] formed a new subsidiary to acquire the assets of [Triad] as was typical of [Taxpayer's] other acquisitions. The acquisition of the assets of [Triad] did not represent an expansion of any of [Taxpayer's] existing automotive division plants, but was an acquisition of a new facility in...Kentucky in which [Taxpayer] never before had any manufacturing plants or operations.
***
81. Copper and nickel anodes are used in the..manufacturing business of [Taxpayer's] automotive division. Bowron Dep.
RESPONSE: Objection. The testimony cited does not support this statement...[Taxpayer] further responds that S-R of Kentucky, Inc. purchased copper and nickel anodes from [Triad] as part of the acquisition of the assets of [Triad], and the purchase of the copper and nickel anodes was not for purposes of [Taxpayer's] other operations. *See* Schwartze Aff.

As stated earlier, neither party asserted at trial or on appeal that there are material facts at issue in this matter but, as evidenced by the above materials filed in support of and in opposition to the motions for summary judgment, we do note that there are some facts in dispute. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc*., 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). "[T]he relevant unitary business inquiry [is] one which focuses on the objective characteristics of the asset's use and its relation to the taxpayer and its activities within the taxing State." *Allied-Signal, Inc.*, 504 U.S. at 785. Upon a review of the facts in dispute, we find that they are not material to the resolution of the issue presented in this matter.

While the Department's evidence shows a potential for a relation to exist between the use of the income earned from the Treasury securities and the Automotive Division, the constitutionality of the tax assessment is premised on the existence of an *actual* relation between the income earned out-of-state and the in-state operations. *Allied-Signal*, 504 U.S. at 777 (quoting *Miller Brothers Co.*, 347 U.S. at 344-45) (there must be "'some *definite link*, some minimum connection, between a state and the person, property or transaction it seeks to tax'") (emphasis added). First, the Department's evidence showed that Taxpayer's diversification strategy was implemented for the purpose of shielding the company against the times when the cyclical nature of the Automotive Division was underperforming; however, no evidence was presented to demonstrate any actual benefit realized by the Automotive Division as a result of this diversification "shield" and, in fact, the evidence showed that the Automotive Division did not experience a shortfall of income during the applicable tax period. Second, the Department's evidence showed that Taxpayer was interested in acquiring businesses that were "synergistic" with its existing business units; however, no evidence was presented to demonstrate the acquisition of a "synergistic" business which was benefitted the Automotive Division's operations. Third, the Department's evidence showed that the income earned from the investment in Treasury securities was placed into an bank account from which the Automotive Division's operations were funded; however, the evidence also showed that the account accumulated funds from various sources and no evidence was presented to show that the income earned from the investment in Treasury securities was actually used for the Automotive Division's operations. Lastly, the Department's evidence showed that Triad's assets and the copper and nickel anodes, obtained in its acquisition, were equipment and raw materials that the Automotive Division used in its operations; however, no evidence was presented to show that any of the acquired equipment or raw materials were actually used by the Automotive Division.

As stated earlier, "the mere fact that an intangible asset was acquired pursuant to a long-term corporate strategy of acquisitions and dispositions does not convert an otherwise passive investment into an integral operational one" and "the fact that a transaction was undertaken for a business purpose does not change its character." *Allied-Signal, Inc.*, 504 U.S. at 788-89. The United States Supreme Court, in denying a state's argument that "intangible income should be considered a part of a unitary business if the intangible property...is 'acquired, managed or disposed of for purposes relating or contributing to the taxpayer's business," held that:

> This definition of unitary business would destroy the concept. The business of a corporation requires that it earn money to continue operations and to provide a return on its invested capital. Consequently *all* of its operations, including any investment made, in some sense can be said to be "for purposes related to or contributing to the [corporation's] business." When pressed to its logical limit, this conception of the "unitary business" limitation becomes no limitation at all.

ASARCO Inc. v. Idaho Tax Comm'n, 458 U.S. 307, 326 (1982) (emphasis in original). Thus, Taxpayer's investment in Treasury securities, by itself, does not convert the investment into an operational function; rather the inquiry into whether the income was used for an operational purpose focuses on the relation of Taxpayer's "use" of the income earned from the investment in Treasury securities to its Automotive Division. The Department's speculative contention that Taxpayer used the income earned from the investment in Treasury securities in the operation of the Automotive Division is not sufficient to create an actual relation between the use of the income and the operations conducted in Tennessee.

Consequently, we find that Taxpayer is entitled to judgment as a matter of law since it met its burden of proving that the tax assessment made on its income earned from its investment in Treasury securities was unconstitutional.

IV. Conclusion

For the reasons set forth above, the decision of the Chancery Court is AFFIRMED. Costs are assessed against the Department, for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE